Supreme Court, U.S.
FILED

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No.

In The
SUPREME COURT OF THE UNITED STATES

FRANK GUIDICE,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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47 pgs

QUESTIONS PRESENTED

Petitioner was convicted under the Hobbs Act, 18 USC 1951, for his supposed participation in a conspiracy and attempt to rob "residents" of a private home (and a corresponding gun charge, 18 USC 924©)) The indictment alleged solely that the subject of the robbery was "residents"of -- not any "business" in -- of a private home. In fact, at no time during the conspiracy, was there ever a business, much less one in interstate commerce, conducted in or from that home. In fact, there were *no* riches in the home, no one engaged in any commerce lived there, and Petitioner was not shown to have believed that there was any commercial nexus.

The questions presented are:

1. Whether an indictment that charges a conspiracy and/or attempt to rob residents of a house, without more, states a federal offense.

2. Whether, assuming the indictment (A.13-15) is sufficient, a conspiracy and/or to rob the residents of a house has a sufficient effect on interstate commerce for federal jurisdiction under the Hobbs Act. where no resident of the house is directly engaged in interstate commerce or employed by a business engaged in interstate commerce during the life of the conspiracy.

3. When the government seeks to satisfy the Hobbs Act's jurisdictional nexus by showing a connection between an individual victim and a business engaged in interstate

commerce, whether that connection must be an actual and substantial one.

The main witness against Petitioner was an indicted cooperator who, in initial debriefings, did not identify Petitioner as having been a participant, but who implicated Petitioner only after a prosecutor intervened. The witness was made to plead guilty to a second offense, of having not identified Petitioner, as a separate crime. Then, the *content* of the plea – that he had lied when he exculpated Petitioner - was elicited before the jury to purportedly "anticipate" impeachment (through this government-created consistent statement). The question is:

4. Whether the government should be allowed to bolster an identification by its cooperating witness by eliciting the content of a second guilty plea, to the effect that that witness had initially lied when he did not identify the defendant as a participant, in light of the fact that juries are not aware of the force of a prosecutor's control under 5K1 and a second guilty plea in reality means nothing as long as the witness continues to satisfy the prosecutor.

Finally, Petitioner suffered a consecutive 5-year sentence for having carried *and* used a firearm in connection with the conspiracy and the attempt. No one testified that a gun was used; the victim testified that she did not remember a gun. The main cooperating witness testified that someone else had put a gun enclosed in a box in a car *other* than that in which Petitioner was (supposedly) present.

5. The Question is: Whether 924©) liability can be imposed

based on constructive possession, and whether the evidence established proof beyond a reasonable doubt, within the Constitutional requirement reiterated in *Jackson v. Virginia*, 443 U.S 307 (1979).

PARTIES TO THE PROCEEDINGS

The parties to the proceedings below were: Prosecutor, United States of America, and Defendants Appellants Frank Guidice, Robert Iacobelli (who is pursuing a *certiorari* petition), and Zaim Kolar.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

OPINION BELOW

The Court of Appeals' unpublished summary decision affirming the convictions is reprinted in App. A.3-12 The Order denying rehearing is at A.1 .

JURISDICTION

The Order denying rehearing was entered on May 2, 2002. Jurisdiction is invoked under 28 USC §§1254(1) and 2101(c)).

RELEVANT STATUTES AND CONSTITUTION

The Hobbs Act, 18 U.S.C. 1951, provides:

(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined under this title or imprisoned not more than twenty years, or both.

(b) As used in this section -

(1) The term "robbery" means the unlawful taking or obtaining of personal property from the person or in the presence of another ... by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or the property ....

* * *

(3) The term "commerce" means commerce ... between any point in a State ... and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

* * *

The Constitution of the United States, Article I, Section 8:

The Congress shall have Power ...

To regulate Commerce with foreign Nations,

and among the several States .....

STATEMENT OF THE CASE

The Offense: Petitioner was tried on an indictment (reprinted at App.13-15) that charged him (and others) with conspiring to participate in a robbery of residents of 3209 Royce Street, Brooklyn – a private home – and of carrying out an attempt to do so. There was no allegation in the indictment that any business was carried on at that residence, or that the object of the conspiracy consisted of proceeds of interstate commerce.

It was the government's theory that at some point of time, a diamond merchant – or someone whom some associate of some conspirator *believed* to have been a diamond dealer – had lived in the house. An unidentified doctor had reportedly told a conspirator's associate that there was a lot of money and possibly diamonds kept in the house.

However, that hearsay rumor had been imparted some three years before the robbery was planned. There was no evidence that Petitioner had any such belief, nor (if he participated) that he had a belief that the robbery concerned anything other than a private home. Nor was there evidence that he believed that there had *ever* been any kind of "business" proceeds in the home at *any* time.

After a number of aborted attempts at entry were made by an ever-changing gang of neighborhood hoodlums whose efforts resonated of a Charlie Chaplin movie, a number of individuals (either two, or four, depending on whether the victim or cooperating witness was testifying) entered the home to find the hoped-for loot. There were, however, no riches in the house. The former resident, Mr. Markovich, whom the government posited was the individual *thought* to have been a

diamond merchant – no longer even lived at the home; he had divorced and moved out before the planning of the conspiracy; his ex-wife remained in the home, to become the victim of a forced entry.

Nor had Mr. Markovich ever been a diamond merchant. He had a tool rental business, which was not conducted from the home (even when he was there prior to the conspiracy).

It was the government's theory – in charging Petitioner and others with a federal crime based on this obviously-local robbery plan – that it did not matter that no business was conducted in or from the home at any time, or that the only "business man" had moved out before the robbery conspiracy, or that there was never a diamond merchant in the home. Rather, according to the government, because proceeds of Mr. Markovich's tool business (not *diamond* business) had in the past been *sometimes* kept in the home overnight, and because *someone* "believed" that a diamond merchant had lived in the home, and because Mr. Markovich's actual *tool* businesses did business in interstate commerce (from elsewhere) during the time of the conspiracy, these defendants could be found guilty of a federal offense. The government claimed that the "factual impossibility" of affecting commerce did not constitute a "defense"; supposedly, one conspirator's *mere belief* that a diamond merchant had kept proceeds from the diamond business or jewelry in his home at a previous time, together with the government's evidence that in actuality, the "real" business of the former resident had some interstate nexus, was and should be sufficient to justify a federal conviction.

Petitioner argued to the Second Circuit that, in light of this Court's recent "commerce" jurisprudence – especially Jones v. United States, 529 U.S. 848 (2000) (holding that arson of a private residence does not satisfy Constitutional Commerce

Clause requirements under the arson statute, 18 U.S.C. 844, even though the arson statute purports to require a factual jurisdictional nexus (i.e., that the object of the arson affects commerce or an activity affecting commerce) - an indictment that charges a defendant with robbery of residents of a private home does not as a matter of law charge a federal offense under the Hobbs Act – and should not – because people always keep things in their homes, including moneys emanating from business, and so any robbery of "residents" could be prosecuted in federal court whenever the remotest nexus with *prior* commerce is shown.

The Second Circuit's summary affirmance (A.3-12) does not even address this argument; it dos not analyze Jones' ruling which acknowledged that there could be a cumulative effect on commerce in that a private home uses gas and electricity, is insured through companies doing interstate business, and has other connections (speculative and remote) with commerce. The Second Circuit simply did not even pause to consider whether an indictment charging robbery of a private home on its face, should be deemed not a matter of federal concern.

Instead, the Second Circuit, by summary order (App.) that shields the judges' superficial "analysis" of the lawfrom public scrutiny and permits recurrent prosecutions of this nature, misstates the record (as discussed in the Petition for rehearing, included in the Appendix), and upholds the convictions because (it claims) *someone* "thought" that there were proceeds of a diamond business in the house at a prior time, and that "belief", which can be *imputed* to Petitioner, is enough! It did not matter that the government proved nothing about even a hypothetical diamond business, which was (according to the government) the "belief" that was "factually incorrect".

The Court of Appeals said that it would be a "different case if the defendants had no knowledge that business proceeds were kept in the home, and planned to rob the home for appliances, jewelry, cash, and other valuable personal items" (Summary Order p 6, App.). "However", the panel continues, "those are not the facts of this case; rather, the facts here indicate that the defendants targeted the home because they believed the residents kept a substantial amount of cash *from their business* [emphasis added] in the home". (Id.)

The indictment did not charge that offense. Nor did anyone say that they "targeted" the home because residents kept cash "from their business" in the home. Even assuming targeting a residence because of a belief that its residents keep proceeds of business activity in their home makes a difference in terms of the viability of federal jurisdiction, the Court's underlying premise was simply not true. As far as the perpetrators were concerned, the rich residents of the Royce Street home could have had moneys stuffed in a mattress for years, or moneys from an inheritance, or anything. There was, in sum, nothing about the "targeting" of the home that implicated commerce, much less implicated an effect, or potential effect, on interstate commerce.

The Forced Identification Of Petitioner And Unfair Bolstering: The evidence against Petitioner was seriously impeached; it consisted primarily of an identification of him by one of the participants, Stoica. When first debriefed after being arrested, Stoica, who had not even known Petitioner before their arrest, did not identify Petitioner as a participant, nor mentioned him. That caused an immediate debriefing-interruptive intervention by an Assistant U.S. Attorney, which induced Stoica to change his story. Not only was he induced to implicate Petitioner (to keep his 5K1 benefit), but he was made to plead guilty, prior to Petitioner's trial, of having lied to the government in that he

had supposedly falsely *not* implicated PetitionerGuidice at first. Then, not only the *fact* of Stoica's false statement plea, but its content - which was but a "consistent statement", wrenched from Stoica with the barrel of the 5K1 gun pointing at his head - was paraded before the jury to bolster Stoica's trial testimony implicating Petitioner.

Petitioner argued to the Second Circuit that this bolstering amounted to the creation and use of a consistent statement, made at a time when the same motivation to curry favor existed – and that its use violates the Rules of Evidence (Federal Rule of Evidence 801(d)) and Due Process. Juries are not in a position to know the real power behind 5K1: If a witness is willing to lie to gain the government's favor in the first place -- which is what a trial is meant to test -- then the witness would be willing to lie in a plea about having lied *to* the government to *continue* the government's favor.

Juries also do not know that, especially under the operation of the Sentencing Guidelines, a witness can lie a second time without in reality risking additional time, even if as a theoretical matter, there might be additional "exposure". If the witness pleases the prosecutor, then as a realistic matter, the "system" does not generally punish him further for a second admission of "wrongdoing" that is consistent with the prosecution's theories. The *fact* that the witness thus pled to falsely *not* implicating someone is unreliable in determining whether a cooperator's trial testimony is truthful or is not.

As the Second Circuit previously held, Fed. R. Evid. 801(d)(1)(B) requires "that the prior consistent statement be made at a time before the motive to falsify arose." United States v. Quinto, 582 F.2d 224, 234 (2d Cir. 1978). The Second Circuit did not address the issue at all.

The Gun Issue: Petitioner was convicted of a separate offense under 18 U.S.C. 924©) – a prohibition against using or carrying a firearm in relation to a conspiracy or robbery attempt. No one – except the prosecutor in summation – testified that a gun was used in the attempt. The victim testified that she did not remember any gun (the prosecutor said she was "confused"); main witness Stoica did not place Petitioner near any gun, or with knowledge of the carrying or use of any gun.

The jury convicted, no doubt, because of the *prosecutor's* improper misrepresentation, in rebuttal summation, that the jury should "recall" that Mrs. Markovich "had her door busted and a gun pointed at her and shoved on couch ..." This egregious misstatement was not corrected by the trial judge. Nor did the Second Circuit condemn the statement, or seriously review the insufficiency of evidence of this independent – and harshly punished - gun offense under 924©).

REASONS FOR GRANTING THE WRIT

I. The Second Circuit's Decision Authorizes Virtually Limitless Prosecutions Where A Private Home Is The Target, Because People Keep Things (Emanating From Commerce) In Their Homes; The Decision Conflicts With This Court's Commerce Jurisprudence And With The Decisions In Other Circuits Circumscribing The Use Of The Hobbs Act In A Private Home Context Because Of The Lack Of A Substantial Commerce Nexus.

A. This Court's Jurisprudence: In United States v. Lopez, 514 U.S. 549 (1995), this Court recognized that prior expansive views of criminal commerce jurisdiction led to attempts by federal prosecutors to prosecute local offenses in federal courts. Lopez, of course, held that a nexus with interstate commerce must be "substantial" – and that there mere statement in a statute or its history that the area is one of federal concern is not enough to justify *carte blanche* acceptance of a particular statute as within Congress' Commerce powers.

While an *over*ly expansive view of Lopez has not been endorsed by the lower courts or by this Court, its limiting *Constitutional* principles still command. Congressional statutes can only criminalize that which is of federal concern – i.e., that which has a substantial effect (or potential substantial effect) on interstate commerce.

The Second Circuit's decision entirely ignores Lopez and its principles. It allowed (hiding behind an unpublished summary order) a conviction based on an indictment, and on facts, that resonate with only private, local interests. As shown

in the Statement of the Cases, there is not the *remotest* connection between anything Petitioner was supposed to have done, and interstate commerce.

In Jones v. United States, supra, 529 U.S. at 850-51 (2000), this Court was unanimous in the holding, reinforced by the opinion in Lopez, that "an owner-occupied residence not used for any commercial purpose does not qualify as property 'used in' commerce or commerce-affecting activity". Therefore, arson of such a dwelling is not subject to federal prosecution under the arson statute, 18 U.S.C. 844i. While the Hobbs Act's jurisdictional requirement – "Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do" – is different from the arson statute's jurisdictional requirement ("Whoever maliciously damages ... any building ... or property used in interstate commerce ... or in any activity affecting interestate commerce") , the concern in Jones that the government's expansive interpretation of 844i would leave "hardly a building in the land ... outside the federal statute's domain", applies equally here: if robbery of *residents* of a home were construed to fall within the Hobbs Act despite the lack of allegation that there is a business in the home, every local robbery would become federal.

The Court should grant *certiorari* and hold that the indictment, which charges robbery of *residents* of a home (A.13-15) – a "dwelling place used for everyday family living" (Jones, 529 U.S. at 859) -- does not state a federal offense.

Even if the indictment were sufficient because the prosecutor (as he easily could) included the words "affecting commerce", this Court should grant *certiorari* to hold that the Second Circuit's interpretation of the "*de minimis" potential*

effects required under the Hobbs Act – assuming *de minimis* still applies in the Hobbs Act context – is at odds with the Constitution, Supreme Court jurisprudence, and with decisions in virtually every other Circuit that has considered the reach of the Hobbs Act in a private-residence setting.

B. Decisions Of Other Circuits: Every Circuit – other than this one – confronted with a private-residence / private individual Hobbs Act prosecution – has given the matter far more consideration than did this Circuit, and has thrown out convictions where the nexus of a robbery with interstate commerce is too remote and insubstantial. In United States v. Wang, 222 F.3d 234 (6th Cir. 2000), the Court reversed a Hobbs / robbery conviction where defendant had robbed private citizens in a private residence of $4,200. Even though the government showed that $1,200 of that money had belonged to a restaurant, and that the restaurant had made out-of-state purchases, the Court held that this robbery did not have even a de minimis effect on interstate commerce. The Wang Court noted (in reasoning applicable here: "[O]ur precedents have involved robberies in which the victims were businesses engaged in interstate commerce. But where, as here, the criminal act is directed at a private citizen, the connection to interstate commerce is much more attenuated".

Wang proceeded on the premise that the "Hobbs Act's de minimis standard survives Lopez by virtue of the aggregation principle" – a matter which this Court has not addressed but ought to. See, e.g., United States v. Taylor, 176 F.3d 331, 339 (6th Cir. 1999) (rejecting a blanket constitutional challenge to the Hobbs Act as applied to robberies of private citizens, or burglaries of a private residences). But, as recognized in Wang, the Circuit, and this Court in Lopez, "declined to apply the aggregation principle in conjunction with long chains of causal inference that would have been necessary to arrive at a

substantial effect on interstate commerce".

Wang looked to a pre-Lopez case, United States v. Collins, 40 F.3d 95 (5th Cir. 1994), in which the Court had developed a test (even prior to Lopez' reigning in of unleashed federal jurisdiction) to determine whether a particular private robbery should be recognized as having the type of commerce nexus necessary to satisfy the Hobbs Act. In Collins, the Court refused to apply the Act to the robbery of an automobile and a cellular telephone from a computer company executive, even though the crime might have prevented the victim from attending business meetings or making business calls. Collins ended up formulating a "test", to the effect that "criminal acts directed toward individuals may violate section 1951(a) only if: (1) the acts deplete the assets of an individual who is directly and customarily engaged in interstate commerce; (2) if the acts cause or create the likelihood that the individual will deplete the assets of an entity engaged in interstate commerce; or (3) if the number of individuals victimized or the sum at stake is so large that there will be some 'cumulative effect on interstate commerce' " (40 F.3d at 100, footnotes omitted)).

This "test" was adopted by the 9th Circuit in United States v. Lynch, 282 F.3d 1049 (9th Cir. 2001), which recognized a distinction between robberies of a business, and a private individual. Lynch also noted that this Collins test had been adopted specifically also in the 8th and 11th Circuits. United States v. Diaz, 248 F.3d 1065, 1084-85 (11th Cir. 2001); United States v. Quigley, 53 F.3d 909, 910-11 (8th Cir. 1995)(holding that a robbery of two individuals who were en route to a liquor store to make a purchase had no effect or realistic potential effect on interstate commerce).

Lynch catalogued cases in all the other circuits – the 4th, 6th, and 7th– that, without adopting a specific test, nonetheless

distinguished between the robbery of private individuals, and the robbery of a business or "business person". See Wang, supra, 222 F.3d at 238-29 (6th Cir.); United States v. Buffey, 899 F.2d 1402, 1404-06 (4th Cir. 1990); and United States v. Mattson, 671 F.2d 1020, 1024-25 (7th Cir. 1982) (holding that extortion directed against an individual does not affect interstate commerce where the payoff does not deplete the assets of an entity engaged in interstate commerce and no other connection with interstate commerce exists).

In contrast to these other Circuits' reasoned decisions, the Second Circuit, in this case, upheld a Hobbs Act robbery conviction where there was not the remotest *potential* effect on interstate commerce, based only on what someone years ago may have "thought". In affirming, the Court endorsed limitless federal jurisdiction of local robberies. This Court should grant *certiorari* to enforce limitations on federal jurisdiction required by the Constitution and by this Court, and to clarify the showing needed (if any suffices) to warrant a federal conviction where robbery of a private residence is concerned.

In this regard, the Court should also clarify that, though an indirect effect on commerce may be found sufficient under a "depletion-of-assets" theory to support a prosecution involving a *business* engaged in interstate commerce, the depletion of an individual's assets by robbery is not a sufficient basis for conviction. Every robbery necessarily contemplates taking "assets". And everyone – through a long chain of inferences – buys goods in interstate commerce. To allow the depletion of assets theory to stand where the object of a robbery plan is an individual's riches, is to sanction a limitless embrace of federal jurisdiction.

The Second Circuit's feeble conclusion that the robbery conspiracy or attempt in this case had the requisite nexus on

interstate commerce, is unreasoned. It distorts all Constitutional principles. It defies judicial fealty to the rule of law. Without evidence either connecting a resident of the house to interstate commerce during the conspiracy period, or even connecting what was in the defendants' mind to interstate commerce, no reasonable juror could have reasonably found an effect on interstate commerce -- even a potential effect on interstate commerce -- had the robbery been successful.

This case is *so* at odds with proper federalism interpretation that this Court could, and should, grant *certiorari* and summarily reverse the convictions for insufficiency and because the indictment does not state a federal offense. (The corresponding 924©) conviction for Petitioner's supposedly having a gun – as to which we showed a lack of evidence which was also not considered fairly by the Circuit – must also be reversed when the robbery predicate is reversed).

II. The Court Should Grant *Certiorari* To Put A Prompt End To The Unfair Prosecutorial Tactic Of Bolstering A Cooperating Witness's Testimony With A Government-Created, Unreliable, Consistent Statement - An Issue Likely To Recur On A National Level And Which, By Boosting The Prosecution's Powers To Control Sentencing Benefits, Will Allow Manipulation Of The Truth-Finding Process Yielding Unreliable Results

Concededly, the issue of bolstering a cooperating witness's testimony with a government-induced declaration against interest made to curry favor but carrying the imprimatur of the prosecution, is not an issue that has been raised in other Courts. Nor was it explicitly discussed by the Circuit here.

However, the issue is one of extreme importance to the fairness of the criminal law generally. Especially in cases where

admissible evidence is not strong, much less "overwhelming" (as here - though the Court wouldn't know this from the Second Circuit's opinion), the bolstering of a cooperator's testimony through the expedient of forcing a second plea premised on having lied about not having implicated a defendant, and then parading that consistent declaration against interest before the jury, is a tactic so unfair as to violate Due Process, if not the Rules of Evidence.

This Court has rarely issued opinions controlling federal criminal trials under the Federal Rules of Evidence. But guidance, and fairness, is required, and – because this issue is certain to arise continually and is all to capable of evading proper evaluation and review – this Court should grant *certiorari* to address the issue.

One of the rare decisions dealing with the Federal Rules is the decision in Williamson v. United States, 512 U.S. 594 (1994), which paves the way to a ruling that the tactic used here is impermissible. Williamson held that the hearsay exception of Federal Rule of Evidence 804(b)(3), for statements against penal interest, is not to be interpreted to cover non-self-incriminatory accusations against a defendant. The Court reasoned that a declaration against one's penal interest is not a deeply-rooted hearsay exception, and, most significantly, it is unreliable because criminals' statements are likely unreliable.

Here, as in the scenario noted in Williamson, Stoica's implication of Petitioner by way of a "second plea" "admitting" guilt in having not implicated Petitioner previously, is the type of unreliable statement that cannot and should not be trusted. Stoica's *self* interest was, at the time, to continue to please the prosecutors so that he could remain in their 5K1 graces.

This Court should grant *certiorai* to consider this serious recurrent issue, of huge importance to a system where the fate

of defendants and cooperators are largely in the control of the prosecution, and where juries are misled by the prosecution's "vouching" for the truth of a witness's testimony by pointing to consistent testimony it induced.

Petitioner's conviction rested significantly on the "thread" of Stoica's implication of him. This Court should grant *certiorari* and reverse.

III. **The Court Should Grant Certiorari To Enforce The Rule of *Jackson v. Virginia*, And Reverse Petitioner's Conviction For Using Or Carrying A Gun In Connection With The Conspiracy And Attempt: There Was *No* Evidence Supporting That Independent Offense, By Which Petitioner Was Sentenced To An Unwarranted 60-Month Consecutive Term Of Imprisonment**

Jackson v. Virginia, 443 U.S. 307 (1979) established that the "reasonable doubt" standard requires, as a matter of Constitutional law, that every element of every offense be proven beyond a reasonable doubt. As (now-)Senior Judge Jon O. Newman wrote, in an incisive article in 1993,. See Hon. Jon O. Newman, Beyond "Reasonable Doubt", 68 N.Y.U.L.Rev. 979 (1993), that standard has been *dis*honored by the lower courts. In this case, all reasonable limits set forth in Jackson were ignored. The Court of Appeals did not even address the showing of evidentiary insufficiency that we made in the briefs: that even the victim testified that she had not remembered any gun, and Petitioner was not placed anywhere near one!

Worse, the Court of Appeal failed to comment on (or condemn) the prosecutor's *substitution* for evidence – her completely baseless allegation in summation that the victim had had a gun pointed at her. Petitioner has been subjected to an additional five years of incarceration for an offense that was not

proven even by a preponderance, fueled by the prosecutor's completely improper argument to the *contrary* of what the victim had testified.

The government failed to respond cogently to our showing of insufficiency: plainly no gun was used (that is what the victim said); moreover, the testimony of star witness Stoica, the only witness who placed Petitioner at the attempt scene (having been forced to do so), was to the effect that a gun may have been put in a different car by a different person, but Petitioner was never in that car!

In Muscarello v. United States, 524 U.S. 125 (1998), this Court established rules of applicability of the "gun" statute, 18 U.S.C. 924©), as it relates to the "carrying" prong. (Bailey v. United States, 516 U.S. 137 (1995), of course, had already established that the term "use" in the statute means *active* use). The Muscarello Court thus held that the term "carry" is not limited to "carrying" on one's person, but should be interpreted to include carrying in a vehicle that one accompanies. The Court did not sanction "vicarious liability", to be imposed when someone other than the defendant "carries" a gun in (another) vehicle. And a reviewing Court ought to comb the record carefully to ensure that the reasonable doubt standard is not obliterated by allowing a conviction because some gun being carried during a crime was mentioned, without showing any knowledge on the part of the defendant.

The Second Circuit, in sweeping the issue under the proverbial rug, ignored its own iteration of the law, in United States v. Canady, 126 F.3d 352, 358 (2d Cir. 1997). In Canady the Circuit had made clear that proof of a defendant's proximity to or accessibility of a firearm, though a necessary element for a finding of "carrying" under §924(c)(1), is not sufficient to support a conviction. Rather, "to uphold [the defendant's]

conviction for 'carrying,' the evidence must [also] establish that, during and in relation to the drug trafficking crime, [the defendant] either (1) had physical possession of the firearm, as distinct from constructive possession, [emphasis added]... or (2) moved the firearm from one place to another." Id.

This Court should grant the Writ to clarify that the mandatory five-year term for a conviction under 924©) cannot be based on "constructive possession" of a firearm.

CONCLUSION

For each of the reasons set forth above, this Court should grant a writ of certiorari to the Court of Appeals for the Second Circuit.

July 2002

Respectfully submitted,

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APPENDIX

Court of Appeals' Unpublished Summary Decision Affirming Convictions A.1

Order Denying Rehearing A.3

Indictment A.13

Petition for Reahearing A.16

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

ROSEANN B. MACKECHNIE
CLERK

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 2nd day of May two thousand two.

USA
Appellee,

v.

Dkt No: 01-1046

Amato (Guidice)
Defendant-Appellant,

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the appellant Frank Guidice.

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED.**

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT

ROSEANN B. MACKECHNIE, Clerk

By: _____
Arthur M. Heller,
Administrative Attorney

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 7th day of March, two thousand two.

PRESENT: HONORABLE ROBERT D. SACK,
HONORABLE ROBERT A. KATZMANN,
HONORABLE BARRINGTON D. PARKER,

Circuit Judges.

Summary Order No. 01-1046

UNITED STATES OF AMERICA,

Appellee,

-v.-

BALDASSARE AMATO; KEVIN ANTINUCHE; MASSIMO BUSCEMI; SALVATORE CHIARAMONTE; GIOVANNI D'ALEO; JOSEPH D'ALEO; RICCARDO FENOALTEA; FILIPPO FIORDILINO; TUDOR MOGA; VINCENT MORENA; JOSEPH O'KANE; SALVATORE PUGLIESE; VINCENZO ANTHONY SCIACCA; FLORIAN STOICA; BRIAN TURK,

Defendants,

FRANK GUIDICE, ROBERT IACOBELLI, also known as Yak, ZAIM KOLAR, also known as Zahir,

Defendants-Appellants.

For Appellant Guidice: VIVIAN SHEVITZ, South Salem, New York.

For Appellant Iacobelli: JANE SIMKIN SMITH (Vincent J. Ancona, *on the brief*), New York, New York.

For Appellant Kolar: Julius Wasserstein, New York, New York.

For Appellee: LAUREN RESNICK, Assistant United States Attorney, Eastern District of New York

(Jo Ann M. Navickas, Assistant United States Attorney, Eastern District of New York, *on the brief*) for ALAN VINEGARD, United States Attorney, Eastern District of New York.

UPON DUE CONSIDERATION of this appeal from a judgment of the United States District Court for the Eastern District of New York (Johnson, *J.*), it is hereby

ORDERED, ADJUDGED, AND DECREED that the judgment of the District Court is **AFFIRMED.**

Defendants Frank Guidice, Robert Iacobelli, and Zaim Kolar appeal from judgments entered in the United States District Court for the Eastern District of New York (Johnson, J.), convicting them, after a jury trial, of armed robbery conspiracy in violation of 18 U.S.C. §1951. Guidice also appeals his conviction for attempted armed robbery, in violation of 18 U.S.C. § 1951, and a related gun charge, in violation of 18 U.S.C. § 924(c). Moreover, Guidice and Iacobelli appeal their sentences.

The convictions stem from a plot and several botched attempts to break into the home of Zinovy and Raisa Markovich in Brooklyn, New York. The parties' familiarity with the facts of this case is assumed.

The defendants argue that the district court erred in allowing the government to introduce "an excess of highly inflammatory evidence about the Mafia" at trial. The defendants claim that this evidence, which was introduced in large part through Anthony Tabbita, one of the government's cooperating witnesses, was irrelevant, prejudicial, and deprived the defendants of a fair trial. It is true that, before the government asked Tabbita about the specific charges in this case, Tabbita gave lengthy testimony on direct examination, filling more than 100 pages of trial transcript, about his criminal background and organized crime connections and that this testimony was graphic at times. See Transcript of Trial at 424-541.[1] While we appreciate that some of the testimony

[1] It is also true that this testimony made one juror nervous enough to ask to be excused, which he was, and another juror to express

appears to be excessive, the record indicates that defense counsel actually welcomed this testimony. Defense counsel did not object to the testimony on the grounds that it was unduly prejudicial; the only objections by defense counsel during this portion of Tabbita's testimony were to form, as well as one 404(b) objection by Guidice's attorney when Tabbita was asked whether Guidice became a member of an organized crime family. Tr. at 431, 443, 503-05, 507, 518, 519, 521. In fact, the record reveals that defense counsel spent a considerable amount of time on cross-examination eliciting more testimony from Tabbita about his criminal background and organized crime associations. Tr. at 609-725, 750-94, 798-800, 809-29.[1] The fact that defense counsel welcomed this testimony was apparent when Guidice's trial attorney told the judge "I'm very displeased with the fact that people are walking in and out while [Tabbita]'s testifying about vicious crimes that are committed because it's taking the jurors' attention away from what the witness is saying." Tr. at 512. It seems safe to assume that defense counsel welcomed all the details of Tabbita's criminal activities in the hope that the jurors would find Tabbita so repugnant that they would discredit his later testimony, which implicated Guidice, Iacobelli, and Kolar in the charged conspiracy. Tr. at 541-56, 563-571. Because the defendants did not object to Tabbita's testimony as unduly prejudicial or irrelevant during trial, they waived the arguments they now raise under Rules 401 and 403. See United States v. Coonan, 938 F.2d 1553, 1561 (2d Cir. 1991) (concluding that counsel waived appellate review of his claim that the trial judge erred in permitting evidence of gang's criminal activities, including gruesome murders, as defense counsel repeatedly failed to object to such testimony and the

concern to the judge.

[1] For example, during cross-examination Guidice's attorney asked Tabbita: "You and Frank [Guidice] are associated with the Gambino crime family, right?" Tr. at 794. Iacobelli's attorney asked Tabbita to explain the hierarchy in the Gambino family. Tr. at 798-99.

defendant actually welcomed the gruesome evidence at times), cert. denied, 503 U.S. 941 (1992); United States v. Del Purgatorio, 411 F.2d 84, 86 (2d Cir. 1969) (noting that appellant was precluded from raising an objection to testimony on appeal given that he made no objection at trial). Defense counsel in the instant case made a tactical decision at trial and the defendants cannot now evade that tactical decision by objecting to evidence they failed to object to and actually welcomed during the trial. See Coonan, 938 F.2d at 1561.

To be sure, the Assistant United States Attorney prosecuting this case wrote a letter to the district court "in support of the admission, pursuant to Rule 404(b) of the Federal Rules of Evidence, of uncharged acts committed by the defendants and others prior to the commission of that offense." The AUSA assured the court that "[t]he vast majority of the[evidence of] uncharged conduct [will] involve[] crimes that are no more inflammatory than the charged offense." That was not so – the litany of lurid crimes about which Tabbita testified were plainly and significantly more inflammatory than the crimes of which the defendants were accused. It is difficult, moreover, not to think that the AUSA appreciated the inflammatory nature of the evidence at the time she made this representation to the court. While we certainly do not condone this conduct if the AUSA were so aware, in light of defense counsel's failure to object, indeed its apparent embrace of the testimony as helpful to the defense, we conclude that it did not lead the district court into reversible error.

Moreover, the government is allowed to bring out on direct examination information that is damaging to its witness's credibility. See United States v. Cosentino, 844 F.2d 30, 33 (2d Cir.), cert. denied, 488 U.S. 923 (1988); United States v. Singh, 628 F.2d 758, 761 (2d Cir.), cert. denied, 449 U.S. 1034 (1980); Del Purgatorio, 411 F.2d at 87. This is to prevent the defense from creating the misleading impression, or the jurors from thinking, that the government was concealing

relevant facts from the jury. See Cosentino, 844 F.2d at 33; Del Purgatorio, 411 F.2d at 87. The trial judge provided the requisite cautionary instruction to the jury, see id., by explaining that despite the testimony of other crimes, the only charges against the defendants were for conspiracy and attempt to commit robbery and the jury was to consider only these charges. Tr. at 1466. The court also advised the jury, as part of its jury instructions, that "you may not infer that a defendant was guilty of participating in criminal conduct merely from the fact that he or she associated with other people who were guilty of wrongdoing or was present at the time the crime was being committed and had knowledge that it was being committed." Tr. at 1971.

We also find that the district court did not err in admitting evidence of the defendants' "other crimes" and ties to organized crime under Rule 404(b). The Second Circuit has held that prior act evidence may be admitted to inform the jury of the background of the conspiracy charged, to complete the story of the crimes charged, and to help explain to the jury how the illegal relationship between the participants in the crime developed. See United States v. Pitre, 960 F.2d 1112, 1119 (2d Cir. 1992) (holding that district court did not err in determining that evidence of prior narcotics transactions was relevant in informing the jury of the background of the conspiracy charged, in that such evidence could help explain to the jury the relationship between the participants); United States v. Rosa, 11 F.3d 315, 334 (2d Cir. 1993) ("it is within the trial court's discretion to admit evidence of prior acts to inform the jury of the background of the conspiracy charged, in order to help explain how the illegal relationship between participants in the crime developed, or to explain the mutual trust that existed between coconspirators."), cert. denied, 511 U.S. 1042 (1994); United States v. Langford, 990 F.2d 65, 70 (2d Cir. 1993) ("It is within the court's discretion to admit evidence of acts committed prior to the time charged in the

indictment to prove the existence of the alleged conspiracy as well as to show its background and history.").

The district court committed no error in admitting evidence of Guidice's pre-existing relationship with members of the Gambino family because it arguably helped explain how Guidice came to participate and ultimately lead the robbery plan and why Guidice confided the details of the robbery to Tabbita after the March 1997 robbery attempt. Evidence that Guidice was a member of the Gambino family also arguably helped to corroborate Stoica's testimony that he initially lied to federal agents about Guidice's involvement because he feared for his safety. Evidence of Iacobelli's relationship with Tabbita also helped explain why Iacobelli would bring the robbery to Tabbita and why Iacobelli would participate in the robbery. Given the abuse of discretion standard we must apply when reviewing a district court's evidentiary rulings, we do not find the inclusion of this "other crimes" evidence to be error. See United States v. Brady, 26 F.3d 282, 286 (2d Cir.), cert. denied, 513 U.S. 894 (1994).

Furthermore, even if we were inclined to find that the court erred in allowing the amount of organized crime testimony that was introduced at trial or in admitting certain evidence pursuant to 404(b), given the strength of the evidence against Guidice, Iacobelli and Kolar, which came mostly from direct participants who were cooperating witnesses, these errors would nevertheless be harmless. See United States v. Lyles, 593 F.2d 182, 196 (2d Cir.) (finding that reversal of defendant's conviction was not warranted given strong case against him despite court's finding that district judge abused his discretion in evaluating evidence under Rule 403), cert. denied, 440 U.S. 972 (1979).

The defendants also challenge their convictions on the basis that the government failed to satisfy the jurisdictional element of the Hobbs Act, 18 U.S.C. § 1951. According to the

defendants, the government presented no evidence that the defendants planned to commit a crime that, if successful, would have violated federal law or any evidence of a potential effect on interstate commerce.

In order to find that the jurisdictional element of the Hobbs Act was satisfied in this case, we must determine whether the conspiracy was one to commit a crime that is prohibited by federal law. See United States v. Jannotti, 673 F.2d 578, 592 (3d Cir.) ("The appropriate inquiry then is . . . whether the defendants' conduct constituted a sufficient threat to interstate commerce so as to implicate an 'area of federal concern' sufficient to give rise to federal jurisdiction."), cert. denied, 457 U.S. 1106 (1982); cf. United States v. Feola, 420 U.S. 671, 695 (1975) ("Where . . . there is an unfulfilled agreement to assault, it must be established whether the agreement, standing alone, constituted a sufficient threat to the safety of a federal officer so as to give rise to federal jurisdiction.").

The evidence at trial sufficed to establish that at least three of the coconspirators, Iacobelli, Tabbita, and LaRussa, believed the residents of the targeted home were diamond merchants and kept at least $1 million in cash, and possibly diamonds, in the home. Tr. at 542, 951, 1005, 1116. Although there was no direct evidence that defendants Kolar and Guidice also believed the residents to be diamond merchants, common sense would suggest, and a jury could reasonably find, that Tabbita would share the basis for his belief that there was over $1 million in cash in the home with those he was trying to recruit for the robbery. It also seems reasonable to infer that when Iacobelli and LaRussa asked Guidice if he would be interested in taking over the robbery, after Tabbita decided he no longer wanted to participate, they would have informed Guidice of the same details they had originally provided to Tabbita (i.e., that the residents were diamond merchants and kept at least $1 million in cash in the house).

Even assuming that Guidice and Kolar had no knowledge that the residents of the home were supposedly diamond merchants, this would not insulate them from being convicted under the Hobbs Act. In United States v. Rosa, 17 F.3d 1531 (2d Cir.), cert. denied, 513 U.S. 879 (1994), the Second Circuit concluded that the jurisdictional nexus could be "satisfied by the belief of at least one conspirator that the goods had traveled interstate" and therefore determined that "we need not explore the evidence of the other defendants' awareness that their crime was federal." Id. at 1546; see also Feola, 420 U.S. at 692 ("[I]t is clear that one may be guilty as a conspirator for acts the precise details of which one does not know at the time of agreement."). Although Rosa involved a conspiracy to receive stolen goods, and not a Hobbs Act violation, one of the issues before the court was what facts would suffice to satisfy the federal jurisdictional nexus ("interstate travel") when the charge is conspiracy rather than the substantive offense. Id. at 1544. The court concluded that the jurisdictional nexus was satisfied either by proof that the goods had in fact traveled interstate (thus rendering the defendants' belief or knowledge regarding interstate travel irrelevant for jurisdictional purposes) or that at least one of the coconspirators believed that the goods had traveled interstate. Id. at 1546. Thus, under Rosa, we may impute to Guidice and Iacobelli the belief that the residents kept proceeds and valuables from their business in their home. This would be a different case if the defendants had no knowledge that business proceeds were kept in the home, and planned to rob the home for appliances, jewelry, cash, and other valuable personal items. However, those are not the facts of this case; rather, the facts here indicate that the defendants targeted the home because they believed the residents kept a substantial amount of cash from their business in the home.

We further find that the government presented sufficient evidence from which a jury could find a potential effect on

interstate commerce had the defendants succeeded in robbing the Markovich's business proceeds. See United States v. Shareef, 190 F.3d 71, 75 (2d Cir. 1999) (explaining that a potential or subtle effect on interstate commerce is sufficient to sustain a Hobbs Act violation); Jannotti, 673 F.2d at 592 (stating that where "defendants agreed to do acts which, had they been attainable, would have affected commerce," a sufficient federal interest was implicated to support federal jurisdiction); United States v. Augello, 451 F.2d 1167, 1170 (2d Cir. 1971) (noting that depletion of the business's resources could "impair the efficient conduct of its business sufficiently to affect commerce"), cert. denied, 405 U.S. 1070 (1972). The government concedes that it did not provide evidence at trial that the fictitious diamond business had an effect on interstate commerce. Instead, it offered evidence that the Markovich's tool business, which actually did exist, was engaged in interstate commerce. This was appropriate as the evidence at trial established that the residents had been in the habit of keeping business proceeds at their home overnight and that Mrs. Markovich typically deposited the money in the bank the next morning. Tr. at 402, 1142-47. The evidence, including invoices, established that the tool business purchased goods from vendors in other states. Based on this evidence, the jury could have reasonably found a potential effect on interstate commerce had the robbery been successful.

Therefore, contrary to the defendants' arguments, we conclude that the government introduced sufficient evidence of an interstate nexus in this case to satisfy the jurisdictional element required in a Hobbs Act violation and to support the defendants' convictions.

We have considered all of the appellants' other arguments. We affirm the judgment of the district court.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

-against-

MASSIMO BUSCEMI,
JOSEPH D'ALEO,
FRANK GUIDICE,
ROBERT IACOBELLI,
ZAIM KOLAR,
TUDOR MOGA,
SALVATORE PUGLIESE
VINCENZO PULLARA,
also known as "Fat Enzo," and
FLORIAN STOICA,
also known as "Chris,"

Defendants.

SUPERSEDING INDICTMENT

Cr. No. 99-536(S-2) (SJ)
(T. 18, U.S.C., §§ 1951, 924 (c) (1) , 2 and 3551 et seq.)

THE GRAND JURY CHARGES:

COUNT ONE
(Conspiracy to Rob)

In or about and between November 1996 and March 11, 1997, both dates being; approximate and inclusive, within the Eastern District of New York and elsewhere, the defendants MASSIMO BUSCEMI, JOSEPH D'ALEO, FRANK

GUIDICE, ROBERT IACOBELLI, ZAIM KOLAR, TUDOR MOGA, SALVATORE PUGLIESE, VINCENZO PULLARA, also known as "Fat Enzo," and FLORIAN STOICA, also known as "Chris," together with others, knowingly and intentionally conspired to obstruct, delay and affect commerce, and the movement of articles and commodities in commerce, by robbery, in that they conspired to commit an armed robbery of the residence of 2309 Royce Street, Brooklyn, New York.

(Title 18, United States Code, Sections 1951 and 3551 et seq.)

COUNT TWO
(Attempted Robbery)

On or about March 11, 1997, within the Eastern District of New York, the defendants FRANK GUIDICE and FLORIAN STOICA, also known as "Chris," together with others, knowingly and intentionally conspired to obstruct, delayed and affect commerce, and the movement of articles and commodities in commerce, by robbery, in that they attempted to commit a robbery of the residents of 2309 Royce Street, Brooklyn, New York.

(Title 18, United States Code, Sections 1951, 2 and 3551 et seq.)

COUNT THREE
(Use of Firearm)

On or and beween November 1966 and March 11, 1997, within the Eastern District of New York, the defendants JOSEPH D'ALEO, FRANK GUIDICE, ROBERT IACOBELLI, ZAIM KOLAR, TUDOR MOGA, SALVATORE

PUGLIESE, VINCENZO PULLARA, also known as "Fat Enzo," and FLORIAN STOICA, also known as "Chris," together with others, knowingly and intentionally used and carried firearms during and in relation to crimes of violence, to wit: the crimes charged in Counts One and Two.

(Title 18, United States Code, Sections 924 (c) (1), 2 and 3551 et seq.)

A TRUE BILL

_____
FOREPERSON

_____
LORETTA E. LYNCH
UNITED STATES ATTORNEY
EASTERN DISTRICT OF NEW YORK

01-1046(L); 01-1127 (con), 01-1182 (con)

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

v.

BALDASSARE AMATO; KEVIN ANTINUCHE; MASSIMO BUSCEMI, SALVATORE CHIARAMONTE; GIOVANNI D'ALEO; JOSEPH D'ALEO; RICCARDO FENOALTEA; FILIPPO FIORDILINO; TUDOR MOGA; VINCENT MORENA; JOSEPH O'KANE; SALVATORE PUGLIESE; VINCENZO ANTHONY SCIACCA; FLORIAN STOICA; BRIAN TURK,

Defendants,

FRANK GUIDICE, ROBERT IACOBELLI, also known as Yak, ZAIM KOLAR also known as Zahir,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

PETITION FOR REHEARING WITH SUGGESTION OF RE-HEARING *EN BANC*

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GUIDICE'S PETITION FOR REHEARING AND SUGGESTION OF EN BANC REVIEW

PRELIMINARY STATEMENT

By summary order entered March 7, 2002 (Appendix hereto), a panel of this Court affirmed appellant's conviction for attempted robbery of a residence, and conspiracy to rob the home's residents, along with a 924c) gun charge. This summary order conflicts with decisions on the Constitutional reach of federal criminal statutes, as well as decisions of this Court discussing requirements for conspiratorial liability. If the panel does not reconsider its ruling, the *en banc* Court should consider this conflict with Supreme Court precedent limiting "commerce power" and enforcing distinctions between federal and local criminal concerns.

Not only does the panel's summary decision conflict with prior cases and with developing Supreme Court limitations, but the very fact that the decision is an unpublished "summary order" wrongly insulates the decision from public scrutiny. Scrutiny is required: the panel misstated certain "facts" and failed to discuss others, which make a significant "difference" to the issues; the panel also sanctioned recognized prosecutorial overreaching and seemingly did not care that jurors were terrorized and induced to convict on passion by the prosecution's tactics.

While refusing to reverse also because of the mountain of irrelevant "organized crime" testimony ("we appreciate that some of the testimony appears to be excessive",p.3; "To be sure, the [prosecutor]...assured the court that the...majority of ...uncharged conduct" will be "no more inflammatory than the charged offense", but "That was not so", p.3), the panel relegates to a *footnote* (order p.3 n.1) the taint of the jury: It notes only that "it is true that this [organized crime and murder-by-the-witness testimony] made one juror nervous enough to ask to be excused, which he

was,[1] and another juror to express concern to the judge". The panel does not report the depth of the fear or that, after the two jurors expressed fears before deliberations began, the court told the two jurors not to worry because the trial was almost over, and that no one knows her phone number or address (Tr.1369-70)!

The panel winks at the prosecutors' overreaching with a rationale that defense counsel "welcomed" the organized crime testimony and did not object to its undue prejudice. That is not so. If space permitted, we could point to dozens of objections, and a pre-trial motion. The ruling distorts the record to achieve an affirmance; it is not fair, and only serves to encourage the United States Attorney's office to continue to

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[1] Judge Johnson fueled the fear, by telling the juror that this was not "upper levels of the mob" ....

> A JUROR: I don't think I could be fair and impartial.
> THE COURT: Why don't you think you could be fair and impartial?
> A JUROR: This is dealing with upper levels of the mob. I don't want to be involved with it.
> THE COURT: First of all, it's not upper levels of the mob.
> THE JUROR: Capos are made members of the mob. Made members are upper levels of the mob.
> THE COURT: I'm not going to discuss the evidence.
> A JUROR: This is a bunch of guys connected with a bunch of made men. I have heard too many stories of people in my neighborhood.
>
> * * *
>
> A JUROR: With all due respect, Judge, you are a lot more protected than a juror living in an Italian neighborhood in Staten Island. (A.646-648).

This juror was excused, and thanked the Court with the explanation: "If you are intimidated, you can't be fair and impartial." (A.650).

instill terror in jurors to achieve a conviction without consequence.

The panel did not even mention our argument that, as a legal, Constitutional, and policy matter, the Hobbs Act cannot and should not be used to federalize robbery of a residence, for the same reason as underlay the Supreme Court's recent decision that the arson statute could not federalize arson of a residence, Jones v. United States, 529 U.S. 848 (2000) – and so, because the indictment charged only that the defendants conspired to (and that my client attempted to) rob "residents" of a private home, the indictment was defective. The panel's summary decision, though hidden from the light of day, is nonetheless a decision of exceptional importance to the fair administration of justice, to a reasoned development of law through a deliberative process, and to the maintenance of the federal-State balance.

The community surely has a right to be "sick of crime". But people are not supposed to be punished just because federal prosecutors want to punish them, or because of appellate judges' fears (as expressed here, in a direct seemingly-irrelevantquestion during oral argument concerning whether a State prosecution would be viable) that there should be punishment regardless of the issues. That can happen only when a summary order is entered and concerns other than the legal merits persuade appellate courts to look away from the real issues. These appellants are entitled to the same consideration as was given to the issues – whether the conduct amounted to the charged federal crime -- in this Court's recent public opinion in the Louima case, United States v. Schwarz, slip op. 8347 (2d Cir. February 28, 2002).

We urge the panel to reconsider, and/ or the *en banc* Court to consider (a) the first impression issue of the applicability of the Hobbs Act to a residence in light of United States v. Lopez, 514 U.S. 549 (1995) and its subsequent decision in Jones v. United States, supra, 529 U.S. 848 (*arson* of a residence is not properly within the federal arson statute

despite cumulative effects on "commerce"; insufficient federal jurisdictional nexus); the Court should adopt the reasoning of the Sixth Circuit, which overturned a Hobbs Act conviction involving the robbery of a residence;[1] and (b) the disastrously unfair use of "organized crime" and "other crime" to prejudice the jury -- which is exactly what happened; and c) other serious issues not addressed at all by the panel, including the improper use of the *content* of a post-cooperation plea by a cooperating witness, that he had lied when he exculpated appellant during theidentification process (the panel did not address the issue of unfair bolstering with a government-created consistent statement, made under the same motive to curry favor).

REHEARING OR REHEARING EN BANC SHOULD BE GRANTED

I. THE PANEL DID NOT DISCUSS THE IMPLICATIONS OF USING THE HOBBS ACT TO PROSECUTE A LOCAL ROBBERY OF A RESIDENCE; THE CONSTITUTIONALITY OF SUCH A PROSECUTION IS AT LEAST DOUBTFUL BASED ON RECENT SUPREME COURT "COMMERCE" CASES

The basic Constitutional issue raised before this Court was not even addressed by the panel. We argued that, just as the Supreme Court limited "commerce" powers in connection with the arson statute – striking down arson of a residence, despite a showing of a cumulative albeit *de minimis* effect of using gas and electricity (inter alia), see Jones, supra -- and just as the Sixth Circuit, in United States v. Wang, 222 F.3d 234 (6th Cir. 2000), threw out a Hobbs conviction involving

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[1] See United States v. Wang, 222 F.3d 234 (6th Cir. 2000), discussed in our briefs, in which the Court refused to accept the "attenuated" effect on commerce of robberies of private citizens.

(as here) a robbery of private citizens in a house (even though $1,200 belonged to a restaurant which had made out-of-state purchases), this conviction should not be allowed to stand. Robbery of residents of a home, if federalized, could spread the reach of the Hobbs Act to almost any residence, if at any time one of the residents (even one who no longer lived there) had taken "business proceeds" home, and even though there was no business (much less one in interstate commerce) run in or from the home.

We argued that the indictment did not properly state a federal crime: contrary to the prosecution's claim in its responding brief, there is no allegation in the indictment that the defendants contemplated that "business proceeds" would be in the home. Rather, the indictment plainly charges a conspiracy and attempted robbery of residents of a private home. On its face, it is not a matter of federal concern.

The panel ignores this argument completely: it undertakes no analysis of Jones' principle (regarding *residences)*, or the contrary Hobbs/jurisdiction decision in Wang, or the other recent Supreme Court cases rejecting the "anything-goes" approval of federal "commerce jurisdiction". Instead, it points to transcript cites that supposedly show that some conspirators heard (from some other absent third party and then through hearsay) that the owner of the house had been a diamond merchant and there was money and "perhaps" diamonds in the house; then relying on this hearsay thought, it leaps to the statement that at least some conspirators therefore intended to rob "business proceeds" and that knowledge of the source of what others may have heard was in the house, i.e., business proceeds, could be "imputed" to Mr. Guidice.

None of the transcript references suggest that anyone "believed" that the riches and money they heard were in the house, were "*business* proceeds".

Jumping from its unsubstantiated premises, however, the panel gives lip-service to our jurisdictional argument with the observation that, it would be a "different caseif the defendants

had no knowledge that business proceeds were kept in the home, and planned to rob the home for appliances, jewelry, cash, and other valuable personal items" (Summary Order p.6). "However", the panel continues, "those are not the facts of this case; rather, the facts here indicate that the defendants targeted the home because they believed the residents kept a substantial amount of cash *from their business* [emphasis added] in the home". (Id.)

That is simply not true - assuming it should make the difference for federal jurisdiction. There is nothing in the record to support a belief on anyone's part that the rich residents of the Royce Street home operated a business or had "business proceeds", as opposed to moneys stuffed in a mattress for years, or moneys from an inheritance. There was, in sum, nothing about the "targeting" of the home that implicated commerce, much less implicated an effect, or potential effect, on interstate commerce.

The Hobbs Act should not be deemed to reach robbery of *residents* of a home. That type of crime does not "affect commerce" in the way that robbery of a business might do (although there, too, courts have been properly rejecting *de minimis* showings). The fact of business proceeds having been in a home, should not be the determinative factor as to federal jurisdiction when the crime concerns robberies of private citizens.

In affirming on its flawed rationales, the panel *also* omits the salient facts that (a) there was never a business run from this residence, and (b) there were never "proceeds" of any "diamond merchant" business (supposedly what some conspirators believed) in the house because the former resident was never a diamond merchant, but rather had been in the tool business. The fact that he have moved out, and had run his tool business (that did interstate business) from some other place, is an unjustified basis on which to sustain a federal conviction for a robbery of residents of his former home. (The panel agrees that the government did not prove

that the non-existent diamond business necessarily would be an interstate business).

The *en banc* Court should step in to resolve the conflict between this panel's silent expansion of the Hobbs Act with Supreme Court precedent limiting federal jurisdiction to its intended and Constitutionally acceptable grasp. The indictment charging robbery of a home, even if there are "business proceeds" in the home, does not state a federal offense.

II. THE PANEL'S RULING ON SUFFICIENCY AS TO APPELLANT'S "KNOWLEDGE" OF FACTS SUPPORTING JURISDICTION ENDORSES SPECULATION, AND IS AT ODDS WITH THIS COURT'S RECENT CAREFUL CONSIDERATION OF EACH DEFENDANT'S KNOWLEDGE AND INTENT IN THE SCHWARZ (LOUIMA) CASE

We also argued insufficiency of evidence to prove Mr. Guidice's knowing participation in the conspiracy and in the attempt. The panel does not address therequisite elements of attempt; nor does it address the independent insufficiency of appellant's related 924c) conviction: the victim herself did not recall a gun being used at the attempt. (The panel did not even comment on the outrageousness of the prosecutor's rebuttal statement that the victim had had a gun pointed at her.)

The panel deals only with the Hobbs conspiracy, mis-analyzing the law and the evidence. Thus, the panel states: "The evidence ...sufficed to establish that at least three of the coconspirators, Iacobelli, Tabbita, and LaRussa, believed that the residents ...were diamond merchants and kept at least $1 million in cash, and possibly diamonds, in the home". (Sum.Order at 5). The panel then accepts that there was no direct evidence (as the panel terms it) that Mr. Guidice "also believed the residents to be diamond merchants" (Id.) But - the panel states - "common sense would suggest, and a

jury could reasonably find, that Tabbita would share [emphasis added] the basis for his belief that there was over $1 million in cash in the home with those he was trying to recruit for the robbery", and that it also "seems reasonable to infer" that "when Iacobelli and LaRussa asked Guidice if he would be interested in taking over the robbery, after Tabbita decided he no longer wanted to participate, they *would have* informed Guidice of the same details ...." (Id., emphasis added).

"Would have" is no basis for conviction. "Would have" in fact didn't happen. Tabbita, who the panel thinks "would have" given information to others who "wouldhave" given it to appellant, was the government's star witness. If Tabbita had informed Mr. Guidice of anything concerning this residential robbery, the government would have elicited that fact. It didn't ask the question. It is not "reasonable to infer" speculative communications; indeed, this appellate speculation was not even advanced by the government at trial or on appeal; it is a sad commentary on the requirement of proof beyond a reasonable doubt!

The panel apparently does not care. It says that even if its supposition that Tabbita "would have" told others, and others "would have" told appellant Guidice the basis of his belief that there was $1 million in the house, Mr. Guidice should suffer federal penalties because, under a different statute discussed in United States v. Rosa, 17 F.3d 1531 (2d Cir.), cert. denied, 513 U.S. 879 (1994), others' "knowledge" can be imputed to him.

Rosa considered the jurisdictional nexus in a case involving a conspiracy to receive stolen goods. The Court there held that the jurisdictional nexus could be satisfied where no substantive act or attempt had been committed (unlike here, where Mr. Guidice was convicted of an attempt under the weakest of evidence), if at least one conspirator believed that the goods had traveled interstate: the fact of interstate travel was but a fact that provided a federal nexus.

Rosa cited (as this panel does) United States v. Feola, 420 U.S. 671, 695 (1975), in which the Court discussed the knowledge / intent requirements of both substantive crimes under 18 U.S.C. 111, prohibiting assault on a federal officer, and conspiracy. The Feola Court held that, just as substantive offenders need not "know" that the victim is a federal official – they need not know that their venture violates federal as well as state law – so too the conspirators need not know; there is a sufficient "threat" to the safety of a federal officer whether the defendants "knew", or did not know, to support federal jurisdiction in that case.

But as the Second Circuit Rosa Court recognized, in Feola the jurisdictional requirement was satisfied "by the existence of facts tying the proscribed conduct to the area of federal concern delineated by the statute". 17 F.3d at 1545. Feola had also recognized that if, in Feola itself, the actual assault had not been carried out, then a "specific belief on the part of the defendants that the intended victims were federal might be essential for the establishment of federal jurisdiction, in order to show that the conspiratorial agreement implicated an area of federal concern". Rosa, 17 F.3d at 1545, citing Feola, at 695-96.

Here, the actual "attempt" showed no potential effect on commerce: nothing – no money, no jewels, no riches – was in the house. The conspiracy can withstand Constitutional scrutiny only if the defendants had a specific belief that their conduct would affect commerce. Without knowledge by thedefendant of the facts that would have supported federal jurisdiction if the attempt had been successful, in other words, there is insufficient evidence showing that appellant entered an agreement which implicated an area of federal concern. Because the attempt implicated no potential affect on commerce, and because appellant was not shown to have believed that the robbery implicated a business that affected interstate commerce, there is no basis for federal jurisdiction. (The government did not prove the interstate nexus of any

diamond business, even assuming anyone believed they were robbing diamond business proceeds and such charge were properly tried in federal court).

The only jurisdictional nexus offered by the government here was the alleged affect on commerce of a tool business, which Mr. Markovich had run from a totally different location. No conspirator believed that the robbery involved a tool business, whether it actually affected interstate commerce or not. Since there was no actual or potential effect on interstate commerce, and no conspiratorial belief, imputed or not, that any defendant intended a robbery of a business that affected commerce, this case should be thrown out of federal court. IT is a local robbery of a home – a matter of (at most) State concern (if provable by competent evidence).

A panel of this Court undertook a far more careful examination of the required federal nexus in the recent "Louima" decision, United States v. Schwarz, 2002 U.S.App. LEXIS 3163 (2d Cir. 2002). It did not resort to an "imputation" of knowledge or intent to any defendant; it concluded that there was no evidence of any conspiracy involving a shared intent or knowledge on the part of the three police officers sufficient to fit the federal obstruction statute – the object of the conspiracy. This panel, on the other hand, excused the lack of evidence that Frank Guidice with its own speculation on what could have happened, but did not! It should reconsider here, with an eye toward the analysis in Schwarz.

There is far more to say here, but we are limited. We urge the court to review the briefs again. Appellants are entitled to the same "fine tooth comb" as was lent to the police officers who participated in a cover-up of a brutal torture.

III. THE ORGANIZED CRIME EVIDENCE WAS THE SUBJECT OF VIGOROUS OBJECTION, WAS IRRELEVANT, AND WAS NOT "HARMLESS"; JURORS WERE TERRORIZED BY IT AND EXPRESSED FEAR, AND THE DISTRICT COURT DID NOTHING TO "CURE" IT

Once again, page limits control our presentation. We can only say that the panel's holding that the defendants "welcomed" the "organized crime" "evidence", because they used it, is a severe distortion of the record and a blow to the role of defense counsel faced with improperly admitted evidence. There was a pre-trial motion directed against any 404(b) evidence; and there were constant objections to the "organized crime" evidence -- elicited from Tabbita, who was not a "member" andwas not an "expert" -- in this case in which the indictment did not charge any "organized crime" nexus". Judge Johnson himself elicited further organized crime "hierarchy" testimony, giving it his seal of approval as far as the jurors were concerned.

The evidence was totally irrelevant as well. Indeed, all that the panel can say is that it "arguably" "helped explain how Guidice came to participate (Sum.Ord.4). Arguably? That is a puny standard on which to affirm the use of highly prejudicial evidence. And our briefs showed that it "explained" nothing; it was designed to inflame, which it did.

The panel's treatment of the jurors' fears merely by saying they existed in a footnote is shocking: the panel does not say that Judge Johnson did not instruct or question the terrified jurors about the fears, nor gave any cautionary instruction. Instead, he told the jurors that their names and addresses were not known, and that they should "bear with us" because the trial was almost over.

To affirm here on the basis of the supposed "strength of the evidence" (Sum.Ord. at 5), without even addressing the jury's taint and the outrageously prejudicial evidence that

explained nothing in dispute, is to discard the notion of the government's burden to prove guilt beyond a reasonable doubt. The case was not "strong": the only witnesses implicating Mr. Guidice were Stoica, whom thegovernment *forced* to identify Mr. Guidice after he had initially not identified him as a participant, and killer Tabbita, who testified only to a post-attempt statement that Mr. Guidice had at some point told him that they had gotten nothing.

The panel does not deal with the first impression challenge we made to the government's eliciting the *content* of a post-cooperation plea it induced the sole identifying witness, Stoica, to agree to – i.e., "admitting" that he had lied when he had *not* implicated Mr. Guidice at first. This improper bolstering through a prior consistent statement, made after the motive to curry favor (and retain a 5K1 letter), is a matter of huge importance. There was nothing but "harmfulness" here, and the panel's offhand summary affirmance should be reconsidered.

IV. WE ALSO JOIN IN CO-APPELLANT IACOBELLI'S ARGUMENTS FOR REHEARING AND REHEARING EN BANC.

CONCLUSION

The Court should grant rehearing and dismiss the indictment.

Dated: March 15, 2002

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